

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

3 UNITED STATES OF AMERICA) CAUSE NO. 3:04-CR-240-P
4 vs.)
5) AUGUST 20, 2008
) DALLAS, TEXAS
HOLY LAND FOUNDATION, ET AL) 10:00 A.M.

PRETRIAL CONFERENCE

BEFORE THE HONORABLE JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

18 FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
19 1100 COMMERCE, 3RD FLOOR
20 DALLAS, TEXAS 75242
BY: MR. JIM JACKS
MR. BARRY JONAS

21 FOR THE DEFENDANT: FREEDMAN, BOYD, HOLLANDER,
22 (SHUKRI ABU BAKER) GOLDBERG & IVES, P.A.
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ALBUQUERQUE, NEW MEXICO 87102
BY: MS. NANCY HOLLANDER
MS. TERESA DUNCAN

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3 NEW YORK, NEW YORK 10005
4 BY: MR. JOSHUA DRATEL
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6 FOR THE DEFENDANT: LAW OFFICE OF MARLO P. CADEDDU
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9 BY: MS. MARLO P. CADEDDU
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13 TAMPA, FLORIDA 33679
14 BY: MS. LINDA MORENO
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16 JONES DAY
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19 BY: MR. JOHN D. CLINE
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21 COURT'S LAW CLERK: MS. JENNIFER HELMS
22 1100 COMMERCE, RM. 1654
23 DALLAS, TEXAS 75242.
24
25 COURT COORDINATOR: MS. BRENDA WEBB
26 1100 COMMERCE, RM. 1654
27 DALLAS, TEXAS 75242
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29 OFFICIAL COURT REPORTER: SHAWN M. McROBERTS, RMR, CRR
30 1100 COMMERCE STREET, RM. 1654
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1 THE COURT: All right. We are here on a pretrial
2 conference on this case.

3 And I didn't want to spend a lot of time -- we won't get
4 into anything on the merits, but I just wanted to talk over
5 some of the scheduling.

6 The case is still set for trial on September 15th as far
7 as jury selection. And we will bring the panel in, 150 panel
8 members, on September the 4th, Thursday September the 4th at
9 9:00.

10 I don't know whether you have had a chance to talk to
11 Greg or Marlo, but we have pretty much decided Judge
12 Fitzwater's current courtroom, he is in the process of moving
13 and it is the biggest one we have. I think that we can fit
14 150 panel members in there pretty comfortably. We may have to
15 use the jury box, as we discussed that day, but we can get 150
16 panel members that morning and hopefully get the process
17 going. And then we will start on the 15th, and hopefully on
18 the 22nd we will start the evidence and get it going.

19 We have been going through -- Jennifer and I are still
20 working our way through the motions. We have draft orders on
21 several of the remaining motions. We should get those out in
22 the next few days. But we are trying to figure out exactly
23 what it is we need to rule on, and one of the issues was the
24 Daubert motions. And I think Jennifer sent you an email.

25 My preference and my practice generally is to rule on

1 *Daubert* motions from the briefing. I have had maybe one or
2 two *Daubert* hearings the entire time I have been on the bench,
3 maybe three. I just don't have very many. And most of the
4 time I find I can rule on them from the briefing.

5 Of course, if we need to have a hearing we will do it
6 during the trial, since so many are out of state, so we can do
7 it when we get there.

8 But file your briefs and responses, and if you need a
9 reply, then I can take a look at it and we will try to rule on
10 these motions from the briefing.

11 And what are the *Daubert* motions that are outstanding
12 that we need to rule on? I know we have one from you on Mr.
13 Mackintosh.

14 MR. JACKS: Mackintosh, Judge, and then there is --
15 We just got word Doctor What's-His-Name is back in play.
16 McDonald?

17 MS. CADEDDU: McDonald.

18 MR. JACKS: The music guy.

19 MS. CADEDDU: He was listed on our witness list.

20 MR. JACKS: I know, but in one of your pleadings you
21 attached a letter saying he couldn't do it.

22 MS. CADEDDU: He can't be completely ready. He is
23 going to do what he can.

24 THE COURT: But you are planning on him testifying.

25 MS. CADEDDU: Yes.

1 MR. JACKS: So we will supplement.

2 MR. CLINE: One other *Daubert* thing. The Government
3 has given notice either Major Classen or Doctor Hoffman. Now,
4 we got an email from Jennifer I think indicating that the
5 Government is not going to call Classen. They are going to
6 call Hoffman.

7 MR. JONAS: Correct.

8 MR. CLINE: So Classen is out of play.

9 We had asked for a *Daubert* hearing on whichever of those
10 that were going to testify, and not just on qualifications but
11 on the underlying reliability of their proposed testimony.
12 Doing that right in advance of the testimony is fine, but we
13 would --

14 THE COURT: Still want a hearing on him?

15 MR. CLINE: Yes.

16 MR. DRATEL: Which is actually how we did it in the
17 first trial also. We had at least one of them right before
18 the testimony.

19 THE COURT: Right before the witness testified?

20 Okay. All right. We will take a look at that. So are the
21 motions filed and ripe?

22 MR. CLINE: The motions are filed and ripe. I don't
23 know that Your Honor -- By the way, we haven't challenged
24 Doctor Hoffman's qualifications, so that is not the issue. It
25 is more of the reliability of the methods.

1 THE COURT: Okay.

2 MR. CLINE: And I don't know just because in the
3 nature of things in a criminal case, you don't have the kind
4 of elaborate depositions and so on that you would in a civil
5 case. I don't know that you are going to be able to rule on
6 that on the papers.

7 THE COURT: And he didn't testify the first time?

8 MR. JONAS: No, he did not.

9 THE COURT: We may need to have a hearing. If we
10 do, I will let you know, and we will set it up. And then just
11 give them some notice, and me, as to when you plan on having
12 him so we can make some plans -- How long would you expect a
13 hearing to take from your side?

14 MR. CLINE: Not long. I would guess maybe a couple
15 of hours for both sides to test him.

16 THE COURT: All right.

17 MR. DRATEL: I think we did the other two in a half
18 day each, less than half a day each.

19 MR. JONAS: Right. Doctor Levitt was about 40
20 minutes on direct, and I believe well over an hour on cross.

21 MR. DRATEL: And Avi was a half a day maybe.

22 MS. HOLLANDER: Not more than an hour or two on each
23 side.

24 MR. JONAS: I don't think the Government will need
25 that much.

1 THE COURT: Are you expecting any others, then,
2 coming from the Defense? We have two from the Government
3 side, and you identified Mr. Hoffman.

4 MR. CLINE: There is -- You mean any other *Daubert*
5 motions or any other experts?

6 THE COURT: *Daubert* motions, yes.

7 MR. CLINE: We have, Your Honor, renewed all of our
8 motions from the prior trial.

9 THE COURT: I am not going to give you a hearing
10 obviously on anything that has already been -- I am looking
11 for new ones.

12 MS. HOLLANDER: There has never been a hearing on
13 Olson. There has never been a hearing on Fighel, because they
14 didn't testify. They were on the Government's list the first
15 time but didn't testify, but they are on the Government's list
16 again. We never had a *Daubert* hearing on either one.

17 MR. JONAS: Olson I think is likely to testify and
18 Fighel is likely not to testify. So I --

19 THE COURT: What is Olson testifying to?

20 MR. JACKS: He is in the -- What do they call it?
21 At the FBI laboratory that deals with encryption and that kind
22 of thing. It is regarding one of the documents that was
23 seized. He compared it to other terrorist documents and the
24 consistency between the two.

25 THE COURT: Okay. And --

1 MR. JACKS: He is not a questioned documents
2 examiner, but the section is Racketeering and Records. They
3 do code breaking, they do, you know, ciphers and that kind of
4 thing.

5 THE COURT: Okay. And you are planning on calling
6 him this time?

7 MR. JACKS: He is a probable.

8 THE COURT: That is the one that we gave you some
9 time to file -- an extension to file your motion to exclude.
10 Have you filed that yet? Has that been filed?

11 MS. HOLLANDER: I don't believe it has.

12 MR. CLINE: We filed one, if I recall correctly,
13 before the last trial, and I don't remember what happened. In
14 fact, I wasn't around then. But in any event, there was never
15 a hearing held on Olson.

16 THE COURT: Are you intending on filing -- Somebody
17 asked for an extension.

18 MS. DUNCAN: We did, Your Honor. And I think what
19 we are thinking now is we will file a motion in limine as to
20 the documents that he intends to compare, so it is not -- I
21 think it is not really a *Daubert* issue so much as it is a
22 limine issue.

23 MS. HOLLANDER: About the documents.

24 MR. JONAS: Your Honor, following that we also
25 anticipate filing a limine motion on some of their experts,

1 not so much challenging qualifications that require a *Daubert*
2 hearing, but more relevance. We filed a similar motion last
3 trial. We would just be refreshing that motion because they
4 have identified additional experts.

5 THE COURT: Okay. And when do you intend on filing
6 that?

7 MR. JONAS: By the motion deadline.

8 MS. HOLLANDER: It is the 29th. And you are
9 planning to have Levitt testify again?

10 MR. JONAS: Yes.

11 MR. WESTFALL: On Olson, are we going to file a
12 *Daubert* motion on him about the testimony about the -- I guess
13 it is the security document is what he is going to testify to?

14 MS. MORENO: I think the discussion is that it would
15 be a limine motion with respect to the document that he would
16 be comparing.

17 MR. DRATEL: We will discuss that among ourselves as
18 to how it will be styled.

19 THE COURT: Okay. By the deadline. Okay. And our
20 concern was we had given an extension, specific extension for
21 the *Daubert* deadline. We are a little more concerned on those
22 obviously than on the motions in limine in terms of getting a
23 response and reply so we can look at them.

24 MS. HOLLANDER: We will decide today.

25 THE COURT: Whenever that deadline was, or if you

1 need some days, but the 29th is a week from this Friday.

2 MS. HOLLANDER: The deadline on Olson was different.

3 THE COURT: It was different. It was a 15th, which
4 was last Friday. We extended it about two weeks. But the
5 29th is a week from this Friday, and we may want it a little
6 sooner than that. If you are going to file a *Daubert* motion,
7 and then we need to get a response in, so we can't take the
8 normal ten days now.

9 MR. WESTFALL: We will discuss it and we will get
10 back with you, Your Honor, on what you do.

11 THE COURT: Get with Jennifer, then. Whatever time
12 you need, let her know and we will work with that.

13 MS. DUNCAN: Mr. Jacks, are we correct that that is
14 the limits of his testimony? He is just going to be comparing
15 these two --

16 MR. JACKS: Yes.

17 MR. WESTFALL: Are we talking about that security
18 document from InfoCom?

19 MR. JACKS: Right.

20 THE COURT: Okay. All right.

21 Yes?

22 MR. CLINE: Your Honor, an issue that I wanted to
23 flag for the Court because I don't want it to easily get lost
24 in the shuffle here, Your Honor has ruled on the discovery
25 motion that the Defense filed, and among other things denied

1 our request for discovery of the name of the witnesses.

2 I wanted to make sure the Court is aware that separately
3 we have submitted a CIPA notice that goes to that issue and
4 certain other issues. And the reason I wanted to flag that is
5 the standard for admissibility at trial is slightly different
6 than the standard for discovery, and we haven't really fleshed
7 that out in the papers, and so I wanted to just mention it
8 here.

9 The standard for discovery in most courts, and as Your
10 Honor has ruled, is the *Roviaro* standard when we are talking
11 about classified information. Your Honor has applied that
12 standard. We respectfully disagree with the ruling, but you
13 have applied the standard.

14 THE COURT: I understand.

15 MR. CLINE: In the admissibility context at trial,
16 most courts do not apply a heightened standard but just apply
17 the rules of evidence, normal relevance 403 type analysis.
18 And so Your Honor may end up ruling the same way, but we would
19 ask that Your Honor make that separate admissibility analysis
20 for purposes of the trial.

21 THE COURT: Admissibility as to?

22 MR. CLINE: We filed it is our fourth CIPA notice,
23 as to the name of both witnesses.

24 THE COURT: So you want a ruling of that as to
25 whether it is admissible for you to go into it?

1 MR. CLINE: Yes, on cross. And there are certain
2 other matters as well that we have listed in the notice all
3 relating to these anonymous witnesses. I just wanted to fly
4 that issue --

5 MR. JONAS: Your Honor, we would just ask that that
6 be done outside the presence of the jury, if you are going to
7 make a ruling from the bench that the jury doesn't have to
8 hear any discussion about their names not coming out. It will
9 come out in -- The first questions will be, "Are you
10 testifying under your true name?" And the answer is going to
11 be no. And I think it can be anticipated that direct
12 testimony won't go beyond that.

13 MS. HOLLANDER: But cross may go beyond that.

14 MR. CLINE: We agree, Your Honor, with Mr. Jonas
15 that the ruling on our CIPA notice is properly outside the
16 presence of the jury. Now, it may well be that issues will
17 come up in the course of the cross, because we don't know
18 exactly the parameters on what is classified and what is not,
19 and they may object, and it may be that you have a little mini
20 CIPA hearing at the bench on some issues. But as far as what
21 we have been able to specify in our fourth CIPA notice, that
22 should certainly be ruled on outside the presence of the jury
23 and preferably before trial.

24 THE COURT: We will get an order on that one before
25 trial, and then any other issues on that that comes up,

1 approach the bench and we will deal with it like that.

2 MR. DRATEL: Your Honor, I am Mr. Dratel. This is
3 the first time I am appearing before Your Honor.

4 Just a couple of scheduling matters. There are two
5 Jewish holidays coming up the end of September, beginning of
6 October. Rosh Hashanah is September 30th and October 1st.
7 That is a Tuesday and a Wednesday. And then Yom Kippur is the
8 9th, which is a Thursday, I believe. It starts Wednesday
9 night.

10 MS. HOLLANDER: October 9th.

11 MR. DRATEL: October 9th.

12 And I was also just curious, because my client Mr.
13 El-Mezain has some arthritis issues and a knee replacement,
14 and so I was just curious about the Court's practice with
15 respect to breaks and in terms of -- He had sort of a second
16 chair that he could put his foot up on at periods of time, so
17 if that would be permissible as well.

18 THE COURT: I don't have any problems with that. We
19 can work that out once we get down there and take a look at
20 the courtroom and see what we have available.

21 What are you requesting as far as the Jewish holidays?

22 MR. DRATEL: Just that we not sit those three days
23 because I don't work on those three days.

24 THE COURT: The days without be which ones?

25 MR. DRATEL: It would be the 30th of September, the

1 1st October, and the 9th of October.

2 THE COURT: So you are wanting to be out of the
3 courtroom all complete days there?

4 MR. DRATEL: Yes.

5 MR. JONAS: Your Honor, if we can just address
6 that. The Government has two suggestions with that. The
7 first is that Mr. Dratel has co-counsel, CJA appointed
8 co-counsel. He can certainly cover for Mr. Dratel. He was
9 there during the first trial. He is a very competent
10 attorney, experienced attorney. There is no reason why the
11 trial can't proceed on those days with a co-counsel.

12 Second, in the alternative, we had collectively requested
13 the Court not have trial on Fridays during the course of the
14 trial. If those particular weeks we have trial so that we
15 don't lose too much ground, as well as right after -- the
16 following week after Yom Kippur there is Columbus Day, so we
17 aren't going to have trial on that day. So if we could have
18 trial on Friday, if we are going to lose these days to the
19 Jewish holidays.

20 MR. DRATEL: I certainly would object to not being
21 here during any part of the trial. I want to know precisely
22 what is happening. Mr. Mysliwiec obviously is appointed, but
23 I am the lawyer for Mr. El-Mezain.

24 And about just the breaks would be sort of a
25 mid-afternoon break and a mid-morning break, the Court takes

1 those?

2 THE COURT: I generally take a mid-morning and
3 mid-afternoon, I generally take an hour and 15 minutes for
4 lunch when we have a jury. And I generally break a little
5 late. We will probably break 12:15 to 12:30. And we will
6 start at 9:00 in the morning. Plan on starting at 9:00 in the
7 morning, take a break about 10:30, and then go until about
8 12:15 to 12:30, take an hour and 15 minutes, and then come
9 back and take a mid-afternoon break.

10 Generally we will break between 5:00 to 5:30.
11 Occasionally, if we have a witness that you anticipate, either
12 side, if they are from out of state and you want to try to
13 finish up on the day, we can work late to try to finish up a
14 witness. But generally plan on breaking between 5:00 and
15 5:30.

16 MR. DRATEL: I just want to alert the Court that
17 today we will be filing a motion for stay with the Circuit on
18 the collateral estoppel.

19 THE COURT: Sure.

20 MR. DRATEL: That has to be filed by mail, so we are
21 creating copies. We will be doing that today. We would have
22 got that done yesterday, but because of the need to create a
23 hard copy.

24 And I guess that is it as far as I have. Thank you, Your
25 Honor.

1 MS. CADEDDU: Judge, I would ask -- I told you this
2 I think before about my children, that I have notice in
3 advance if we are going to go beyond 5:30 because my
4 children's school closes at 6:00. I doubt that they put them
5 on the sidewalk, but --

6 THE COURT: I understand. We will certainly give
7 you some notice. We will plan on breaking at 5:30, because
8 you mentioned that before. So if we need to stay late, let us
9 know in advance so we can let Marlo go.

10 And the other problem we run into is the jurors. Once we
11 get the panel in, sometimes they need to leave early, so we
12 will deal with all that --

13 MR. DRATEL: I have actually one other question,
14 Your Honor, just directed at the Government, which is whether
15 the Government is going to use the same exhibit sequence in
16 terms of series as they did the first time.

17 MR. JONAS: No. We are renumbering and
18 reidentifying our exhibits to make them easier to follow. The
19 exhibit list, which we will try to get to you in advance of
20 the due date, will have the new numbering system and the old
21 numbering system right next to it.

22 MR. DRATEL: That would be helpful.

23 MR. JONAS: And Mr. Cline and I had email discussion
24 on this. The stipulations, are we still on for the
25 stipulations that we signed for the last trial?

1 MR. CLINE: The ones that I recall we talked about
2 had to do with the foreign records.

3 MR. JONAS: The ones that we signed before trial
4 covered domestic and foreign banks and a whole slew of other
5 exhibits.

6 MS. HOLLANDER: I think so, but we should probably
7 just look at them.

8 MR. CLINE: I don't think we will have a problem
9 with that, but we need to --

10 MS. HOLLANDER: The ones involving the banks and --

11 MR. JONAS: There is banks, search warrant material,
12 there was FISA material, American Express records. You also
13 had something in there regarding the Jamil Hamami records,
14 travel records. There is a slew of evidence; basically the
15 authenticity and hearsay issues. It certainly saved a large
16 number of witnesses. And if you will not agree to the
17 stipulations, we need to know because that will probably
18 double our witness list.

19 MS. HOLLANDER: Do you readily have that
20 stipulation?

21 MR. JONAS: Not with me sitting here today. I know
22 I had emailed it to you, and I can email it again when I am
23 back in Washington on Friday.

24 MR. CLINE: That would be good. Sorry to involve
25 you in this, Your Honor, but we ought to come up with a list

1 of those stipulations on both sides that we are going to agree
2 to. I don't think there is going to be a problem, but we
3 ought to come up with a list so we all know what they are, and
4 then we can just get them out of the way.

5 MR. JACKS: Are you talking about the one from the
6 last trial?

7 MS. HOLLANDER: Yes. If you could email it to all
8 of us, it would just make it easier if you would email them
9 again and we can get back to you right away.

10 MR. JONAS: I am just thinking of the primary one
11 that we did on the evidence. I know there was some other ones
12 that we did during the course of the trial that were very
13 short, and I am not even concerned about those. I think most
14 of those came from you.

15 MS. HOLLANDER: Most of those are probably not going
16 to come up again.

17 MR. JONAS: Probably not. But right now the primary
18 concern is do we need to start lining up custodian witnesses.

19 MR. CLINE: You don't.

20 MR. JACKS: The big one, was it marked and admitted?
21 I mean, I am assuming it was admitted for record purposes. I
22 just don't know if it was on the website for the Court's
23 exhibits.

24 MS. HOLLANDER: The big stipulation?

25 MR. JACKS: Yeah.

1 MS. HOLLANDER: It is a court exhibit. It was
2 listed -- They were listed as court exhibits, and I think
3 there were ten of them altogether.

4 MR. JACKS: I don't remember if they were on there
5 or not.

6 MS. HOLLANDER: I have them all.

7 MR. JACKS: I can look in my office when we get back
8 upstairs.

9 MR. CLINE: But in terms of lining up custodial
10 witnesses, you don't have to worry about it.

11 MR. JONAS: Your Honor, if I can raise one question
12 on scheduling. You mentioned that evidence will start on the
13 22nd. Will opening start that day as well, or will openings
14 be the prior week?

15 THE COURT: It may depend on how quickly the jury
16 selection goes. I would like to start the evidence on the
17 22nd, but we will see.

18 That week of the 15th when we are doing the jury
19 selection, I am not committed to being off that Friday. I
20 would like to finish the jury selection, maybe read the
21 indictment, have the opening statements made, and be ready to
22 start the evidence on the 22nd. That is the game plan. But
23 it depends on how jury selection goes.

24 MR. WESTFALL: Do you expect, Your Honor, to do jury
25 selection the way Judge Fish did.

1 THE COURT: I have talked to him about it. I am not
2 sure what all you mean by that. Is there something in
3 particular --

4 MR. WESTFALL: Just the seven and a half minutes a
5 side?

6 THE COURT: Yes. I may limit the scope. And that
7 is a good question, and we can talk about this on the 4th, but
8 what I am thinking of is limit the scope to publicity,
9 terrorism, and then anything that is in those forms, the
10 questionnaires that they fill out that you think needs to be
11 gone into.

12 MR. WESTFALL: And then you will do -- Once we have
13 picked them all, you will do a panel voir dire.

14 THE COURT: I am going to do a panel voir dire
15 actually at the very beginning on the 4th. Remember when we
16 were down in the jury room? It is a while back. But my plan
17 is to go ahead and have a general voir dire on that date.

18 MR. WESTFALL: So on burden of proof and that stuff,
19 that will be on that date?

20 THE COURT: Yes.

21 MR. WESTFALL: And you are open to us submitting
22 questions and issues?

23 THE COURT: Yes. In fact, I think I had asked. I
24 don't know whether I asked in front of the group or whether
25 you were here with Jim. I want to acquaint the jury with the

1 type of case it is, so submit something that you want me, in
2 terms of explanations --

3 MR. WESTFALL: We did. I filed that.

4 MR. JACKS: I have got mine ready.

5 THE COURT: And I don't need it, obviously, until
6 somewhere before the 4th.

7 MR. WESTFALL: Ours was filed.

8 THE COURT: So I will acquaint the jury with the
9 Government's position and with your position, and then getting
10 into the general criminal issues that apply, and then get into
11 the hardship.

12 MR. WESTFALL: And the press? Were you going to
13 handle the press?

14 THE COURT: Go ahead and handle some of the
15 publicity, yes.

16 MR. WESTFALL: We did a long series on press issues
17 as well.

18 MS. HOLLANDER: This is just a question, but they
19 are going to come in and fill out their questionnaires first?

20 THE COURT: No, after.

21 MS. HOLLANDER: First you are going to do this.

22 THE COURT: Acquaint them with the case before they
23 fill out the questionnaires.

24 MS. MORENO: Because some of them may have not to
25 fill out questionnaires if they heard about the case.

1 THE COURT: Right. What I was thinking is once we
2 finish that process, I will ask for hardships, take the
3 hardships there. And however many raise their hands with a
4 hardship, we will keep those in the courtroom and send the
5 others down to the first floor and let them start filling out
6 the questionnaire.

7 As we deal with hardship on an individual basis, if they
8 are excused, they are excused; if they are not, we will send
9 them on down to fill out their questionnaire.

10 MR. JACKS: Judge, you made up your mind about
11 individual voir dire, that you are going to permit that.

12 THE COURT: I think that is the plan. Yeah, I think
13 so. I think we can do that. I think initially last time we
14 gathered back in March, I was still wanting to -- thinking
15 about waiting until after we heard from the panel as a whole.
16 But I think I need to decide before then just so you all will
17 know where we are going. So we will go ahead and commit to
18 that.

19 MR. WESTFALL: We will be ready for it.

20 THE COURT: I know you will.

21 MR. CLINE: Your Honor, one last thing, and I am
22 sorry to keep harping on this CIPA issue but we haven't
23 briefed it just because of the way it came up, and so I want
24 to make sure I get one thing --

25 THE COURT: Did you want supplement briefing on

1 that?

2 MR. CLINE: I don't think it is really necessary,
3 but I want to give you one cite that explains this difference
4 before the discovery standard and the admissibility standard.
5 It is in footnote 4 of our motion for discovery. It is *U.S.*
6 *versus Libby*, and the cite is 453 F.Supp.2d 455. It is a
7 District of Columbia case.

8 THE COURT: I have read the case, in fact in
9 connection with your motion.

10 MR. CLINE: I just wanted to --

11 THE COURT: It is a long one.

12 MR. CLINE: It is very long. In any case, I just
13 wanted to make sure you were aware of that case.

14 MR. WESTFALL: Your Honor, there was one other thing
15 about the jury. We had submitted a questionnaire that
16 included some changes, some suggested changes that we were
17 asking for leave of the Court to consider.

18 THE COURT: Okay. And you have already filed that?

19 MR. WESTFALL: Yes, sometime ago. And most of the
20 changes are cosmetic. There is a couple, like getting rid of
21 Nathan Garrett's name. There is a few changes on there that
22 are substantive, and we just wanted to direct your attention
23 to that. I know -- We don't consider it a wholesale change,
24 but there are some changes and we wanted you to consider --

25 MS. MORENO: And we actually introduced, Your Honor,

1 in the beginning paragraphs to those changes so they are
2 pointed out. And there is probably just four or five
3 questions.

4 THE COURT: And you are going to object?

5 MR. JACKS: Yes, sir.

6 THE COURT: Have you filed a response?

7 MR. JACKS: No, but I will do that before Friday.

8 THE COURT: We will need to resolve that before the
9 4th, obviously. Thanks for pointing that out. I don't know
10 that I was aware of that. We will take a look at it.

11 Any other issues we need to address?

12 MR. JONAS: Just, Your Honor, with regard to Mr.
13 Dratel's issue with the Jewish holidays, and with now the
14 suggestion of sitting out on Fridays. We have a lot of
15 witnesses coming in from out of the state and out of the
16 country. If you can let us know soon, because we need to make
17 travel arrangements for them. If we sit out on Fridays, that
18 will affect when they testify.

19 THE COURT: We were aware of those holidays. I
20 think it had been raised, and we were aware that we would have
21 to deal with that, and then the Columbus Day, and so we have
22 been talking about whether we need to work on Fridays those
23 weeks, and so we will make a decision and then --

24 MR. JONAS: If I could ask Mr. Dratel, assuming we
25 don't sit on the Jewish holidays, would you plan on that

1 Monday before Rosh Hashanah breaking early, the same goes for
2 the day before Yom Kippur, or would --

3 THE COURT: He is asking for two days for Rosh
4 Hashanah.

5 MR. JONAS: Right. The Jewish holidays start
6 sundown the day before, and I know Mr. Dratel lives in New
7 York.

8 MR. DRATEL: I can get back to the Court. I haven't
9 checked things like plane schedules and things like that, and
10 also just in terms of just family, you know, for some of --

11 THE COURT: Is Rosh Hashanah two full days?

12 MR. DRATEL: Yes. So one of them. But for the one
13 day, Yom Kippur, it may not be worth going back for. It will
14 be too hard to turn around and get the whole holiday in. So I
15 will make that -- I will find out this week and get back to
16 the Court on that.

17 MS. HOLLANDER: And then you will give us kind of a
18 calendar of which days, because we have to make travel plans.

19 THE COURT: We will do that.

20 MR. JONAS: Your Honor, just to give the Court a
21 heads up and Defense attorneys a heads up, Mr. Cline raised
22 the discovery motion. In your order you granted their motion
23 to the extent with regard to CIA cables, anything that was
24 responsive. We will be filing I think a letter real soon,
25 probably a classified letter under CIPA, which we will to cc

1 Defense counsel on. It will be a very short letter stating
2 basically there is nothing responsive.

3 In their motion the Defense attorneys assumed that
4 certain material existed within the possession of the CIA.
5 Mr. Jacks, Ms. Shapiro, and I went to the CIA and reviewed
6 over a thousand documents, and there is nothing there that
7 addresses exculpatory or that is in their favor at all. In
8 fact, the information is completely inculpatory that they
9 want. And we will be sending you a letter just on that.

10 THE COURT: Okay. All right.

11 MR. JONAS: I am a little vague, but we are not in a
12 classified setting here so I can't be more specific right now.

13 THE COURT: Right.

14 MS. DUNCAN: And Your Honor, this won't affect the
15 proceedings at all, but I have a trial the first week in
16 September, so I likely will not be here on the 4th. Ms.
17 Hollander will be representing Mr. Baker.

18 THE COURT: Does he go by Baker.

19 MS. HOLLANDER: He goes by Abu Baker. Abu Baker is
20 the last name.

21 THE COURT: I will let you introduce your clients to
22 the jury.

23 All right. Anything else, then, from the Defense that we
24 need to address?

25 MR. WESTFALL: No, Your Honor.

1 THE COURT: Mr. Jacks, Mr. Jonas, anything else from
2 the Government?

3 MR. JACKS: No, sir.

4 THE COURT: Brenda, can you think of anything we
5 needed to touch on?

6 Okay. All right. Thank you for being here. If you want
7 to -- probably they will break about 10:30 if you want to go
8 into Judge Fitzwater's courtroom. And we will see you back on
9 the 4th.

10 (End of Hearing.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts

06/17/2009

10 _____ DATE _____
11 SHAWN McROBERTS, RMR, CRR
FEDERAL OFFICIAL COURT REPORTER

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